No. 15966

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA; THE ASSOCIATED GENERL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC.; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER; INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 242, AFL-CIO; and WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO, *Respondents.*

ANSWER TO PETITION FOR ENFORCEMENT AND PETITION FOR REVIEW OF MOUNTAIN PACIFIC CHAPTER OF ASSOCIATED GENERAL CONTRACTORS

BRIEF OF RESPONDENT MOUNTAIN PACIFIC CHAPTER OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, IN SUPPORT OF ANSWER TO PETITION FOR ENFORCEMENT AND PETITION FOR REVIEW

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Answer to Petition for Enforcement and Petition for Review of Mountain Pacific Chapter of Associated General Contractors

BRIEF OF RESPONDENT MOUNTAIN PACIFIC CHAPTER OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, IN SUPPORT OF ANSWER TO PETITION FOR ENFORCEMENT AND PETITION FOR REVIEW

STATEMENT OF CASE

A. Counter and Additional Statement of Case

Mountain Pacific Chapter of Associated General Contractors of America (hereinafter referred to for the sake of brevity as Mountain Pacific) is an independent

incorporated association of employers (R. 98) whose members are primarily engaged in what is called heavy construction (R. 96) such as dams, bridges and highways. Contrary to petitioner's statement, pages four and five of its brief, neither Mountain Pacific nor its members secure or recruit workmen from either respondent Western Washington District Council of International Hodcarriers, etc. (hereinafter called District Council), or from its local union Number 242 (hereinafter referred to as Local 242) (R. 99, 100). Mountain Pacific does not hire any mechanics or laborers and is not itself engaged in the contracting field (R. 99) but acts solely as representative of its members in negotiating labor agreements. Mountain Pacific did, with the Tacoma Chapter and the Seattle Chapter, both of which are separate corporations, jointly sign with District Council but not with the individual members of the council such as Local 242, the labor agreement which includes the complained of Section 6 hiring provisions (General Counsel's Exhibit No. 4, R. 178). Members of Mountain Pacific do recruit labor through local unions represented by District Council that are not named in this action.

Cyrus Lewis, a hodcarrier, sought membership in and employment through respondent Local No. 242 (R. 141, 142). His work as a hodcarrier is foreign to the class of work in which Mountain Pacific members are engaged. There is no evidence that Cyrus Lewis ever applied for work of any kind with Mountain Pacific [redacted] or any of its members or any union with whom Mountain Pacific members customarily deal in recruiting labor. There is no evidence that any work refused Cyrus Lewis

involved Interstate Commerce. There is no evidence that the hiring hall clause, Section 6 of the labor-agreement, resulted in or caused Local No. 242 to discriminate against Cyrus Lewis.

The trial examiner specifically found and concluded that there was no evidence to support the charge against Mountain Pacific and the other A.G.C. chapters of an unfair labor practice as to Cyrus Lewis (R. 33-35).

B. Questions Involved

The answer and petition for review of Mountain Pacific raises the following questions.

1. Were the provisions of Section 6 of the collective bargaining agreement (R. 178) providing for recruitment of employees through union administered hiring halls *per se* illegal? Respondent Mountain Pacific contends that the answer should be no.

2. Was Mountain Pacific an employer under act or engaged in Interstate Commerce insofar as Lewis was concerned? Mountain Pacific urges it was not.

3. Assuming the provisions of the contract for labor recruitment to be illegal *per se* and further assuming that the operation of the hiring hall of Local 242 was discriminatory as to Cyrus Lewis, was Mountain Pacific merely because a party to the collective bargaining agreement with Washington District Council liable to make Cyrus Lewis whole for lost wages if any, where Mountain Pacific had no part in the discriminatory acts complained of, never dealt with Local 242 and there is no evidence that Cyrus Lewis ever sought employment from Mountain Pacific or any of its members? Moun-

tain Pacific contends that it is not responsible for acts of Local 242.

4. In the absence of proof that discrimination by Local 242 against Cyrus Lewis in job referral, resulted from a hiring clause, can N.L.R.B. and the courts presume such to be the case? Mountain Pacific urges there is no basis for such presumptions.

SPECIFICATION OF ERRORS

1. The National Labor Relations Board has erred in finding or concluding contrary to trial examiner's concluding findings (R. 23-35) that Mountain Pacific violated Section 8(a)(3) and (1) of the act (Decision and order of N.L.R.B. paragraph (2) appearing at R. 45).

2. The N.L.R.B. further erred in finding No. 3 that "the implementation of the unlawful contract in the rejection of Lewis' continuous application for employment was an unfair labor practice, and that the respondent union thereby violated Section 8(b)(2) and (1)(A) of the act and the respondent employers thereby violated Section 8(a)(3)(1) of the act" (R. 46).

3. The N.L.R.B. further erred in not following the findings of the trial examiner as set forth in his concluding findings in intermediate report (R. 6) particularly the following:

> "But it seems to me that hiring hall provisions which are not stated in discriminatory terms do not become discriminatory simply because of the omission of an express prohibition against discrimination." (R. 30)
>
> "Despite the discriminatory treatment accorded Lewis by Local 242, the record will not support a finding that any members of the AGC Chapters (or,

for that matter, any other employer) discriminated 'with respect to the hire of Lewis, as the complaint alleges, and that Local 242 caused such discrimination, within the meaning of the Act. The heart of the matter is that there is no evidence in the record that any member of any of the AGC Chapters sought or requisitioned any labor at or through the office of Local 242 at any time since the effective date of the contract. Moral convictions that such requisitions were made will not suffice, for they are no substitute for evidence." (R. 33, 34)

"There is no doubt, as pointed out earlier, that Local 242 discriminated against Lewis, but there can be no finding that it discriminatorily exercised the authority delegated to it by members of the AGC Chapters if there is no evidence that at any time since the effective date of the agreement, any of these members sought or requisitioned labor from Local 242, the agency through which Lewis sought job referrals. The critical fact is that there is no such evidence, and however one may condemn the treatment accorded Lewis by Local 242, and desire to do him moral justice, one must not blind himself to deficiencies in the evidence." (R. 35)

ARGUMENT

Respondent Mountain Pacific's answer and petition for review raised questions of both law and fact. Its position may be summarized as follows:

1. Mountain Pacific is not subject to the jurisdiction of the National Labor Relations Board in that as to this case it was not an employer within the meaning of the Labor Management Relations Act of 1947 nor was it engaged in commerce. The mere fact that Mountain Pacific may be subject to jurisdiction for some purposes does

not by virtue thereof subject it to jurisdiction in all cases of unfair labor practices.

2. It is not established that Mountain Pacific engaged in any unfair labor practice. It was established that neither Mountain Pacific nor its members had any business transaction with Local 242.

3. The board's conclusion and findings as to Mountain Pacific are not supported by the evidence and are based on surmise and conjecture.

The argument in support of Mountain Pacific's position cannot readily be separately stated and accordingly arguments for each point are commingled but will be segregated to the maximum extent possible.

I.

Lack of Jurisdiction

Mountain Pacific is a legal entity. Some of its contractor members do engage in Interstate Commerce and do employ persons within the protection of the National Labor Relations Act. From this fact the N.L.R.B. concludes that it has jurisdiction as to Mountain Pacific in this case, even though there is no evidence of Interstate Commerce activities of either Mountain Pacific or its members as to work if any available to Lewis, a Hod Carrier. Merely because one is engaged in Interstate Commerce for some purposes, does not make the person subject to jurisdiction of the National Labor Relations Act for all purposes.

The word employer as used in the Labor Management Relation Act of 1947 is defined in Section 2 as follows:

"The term 'employer' includes any person acting

as an agent of employer directly or indirectly * * *."

From the definition of the Act it does appear that an employer is either the actual employer of labor in Interstate Commerce or one who acts as an agent for the employer. The mere fact that a person may be an employer as that term is generally understood and defined does not of itself make a person an employer insofar as the Labor Management Relations Act of 1947 is concerned. The basic question in this case is whether Local 242 under common law principles or definitions of the Act in assigning men to work acted as agents of Mountain Pacific so as to impose liability on Mountain Pacific for illegal hiring practices of the union, if any. Mountain Pacific is an employer of its own office employees. It was under definition of the act an employer in negotiating the collective bargaining agreement under consideration in this case, because in signing the agreement it acted as agent for its members who were in turn employers under the Act. Its agency under the evidence ceased with the signing of the agreement unless further acts of agency be proved. General Counsel and the Board assert Mountain Pacific is liable because of alleged implementation of the agreement. There is no proof whatsoever that Mountain Pacific implemented, encouraged or acted for any employer insofar as Lewis and Local 242 is concerned. Mountain Pacific becomes an employer only if it is in itself employing labor out of Local 242 or acts for its members in so doing. Mountain Pacific may for certain purposes under the act be an employer, because acting as an agent for employers, namely contractors engaged in the construction indus-

try. Construction contractors, members of Mountain Pacific are never agents of Mountain Pacific, either under definitions of Act or the evidence. There is no evidence that Mountain Pacific ever seeks to obtain employees for its Contractor members. Likewise, the mere fact that Mountain Pacific members engage in Interstate Commerce does not, even if Mountain Pacific is an employer, make it liable for all unfair labor practices occurring in the State of Washington. Assume for example, that a Contractor engaged in Interstate Commerce as an employer has a residence in the state and calls on Local 242 for two purposes. One for some laborers to do digging about his residence and the other for the purpose of handling materials that have moved in Interstate Commerce. Assume in both cases that the employment of the individuals involved was discriminatory under the descriptions of Section 8(a)(1) and (3) of the Act. It would appear obvious under these facts that assumed employer could be charged with discrimination as to one employee but not the other. There is no evidence that any member of Mountain Pacific or Mountain Pacific had any work for Lewis or any hod carrier (R. 141, 142), in fact the record is that the members of Mountain Pacific do not use Local 242 as a source of labor (R. 99, 100). There is no evidence that hod carriers are used by Mountain Pacific members on highway and heavy construction.

II.

Implementation and Illegality of Contract

In paragraphs two and three of the N.L.R.B. Decision and Order (R. 45, 46) the Board reversed the trial examiner and in effect found although no formal find-

ing was made that by executing and maintaining in effect the hiring provisions of the agreement, that is by implementation of the unlawful contract, both Local 242 and Mountain Pacific violated Section 8(a)(3) and (1) of the Act. There is no evidence that Mountain Pacific did anything to implement or enforce the agreement after its execution. Implementation as found by the Board, therefore, seems to rest solely on the fact that the Collective Bargaining Agreement after it was once executed was not terminated by mutual agreement of the signatories thereto, and accordingly the N.L.R.B. order rests entirely on the illegality of Section 6 of the Contract. The legality of Section 6 will be covered by briefs of other respondents in this action and as such are incorporated by Mountain Pacific as if herein fully set forth. Mountain Pacific does agree with the trial examiner's comments on hiring halls particularly his comment (R. 28, 29) as follows:

> " * * * Upon close scrutiny of the General Counsel's position, what it implies is that one should indulge a presumption from the naked provisions of Section 6, alone, that the parties thereto intend to, and will, use them for unlawful purposes, despite the fact that they may also be used for the lawful purpose of furnishing employers with an advantageous source for the supply of labor, and jobseekers with a convenient method of securing work. The adoption of such a doctrine would, in my judgment, run counter to traditional and elementary legal concepts. * * * "

We further agree with Abe Murdock, Board member's dissenting opinion (R. 55-63 inclusive), particularly the following statement made by him.

"* * * This is as much as to say that an employer violates Section 8(a)(3) of the Act merely by discharging a union member unless at the same time he states that the discharge is for economic reasons. My understanding of the law is that the General Counsel must prove by a preponderance of the testimony that the discharge was intended to encourage or discourage union membership. Absent such proof, no unfair labor practice has been committed whether or not economic reasons were assigned by the employer for the discharge at the time it occurred. My view of the law in this respect is so well settled that it needs no citation of authority. In my opinion, the majority's novel approach to the hiring hall issue amounts to nothing more than a finding that an otherwise lawful contract is unlawful unless the parties agree to include words expressing their lawful motivation. To my knowledge this is the first time that the Board or any court has found an unfair labor practice solely on the ground that the respondent failed to express a lawful motivation at the time the alleged unfair labor practice occurred." (R. 60, 61)

III.

Answer to Appellant's Argument

Conclusions of law and orders of court are based on facts fairly found from competent evidence. These fundamental rules of law are not changed by the Labor Management Relations Act. Under the foregoing principles, the rule should be, and we believe it is, that the findings of the trial examiner are not to be upset by the Board, or this court, unless clearly contrary to the evidence introduced. *N.L.R.B. v. Swinerton,* 202 F.(2d)

511. Particularly would the foregoing be true where the evidence is not controverted, or where a finding is refused or not made because no competent evidence to support the same can be found in the record. Findings should not be based on assumptions and surmises, but on the record. We are not in a field where legal presumptions or judicial notice take the place of evidence. General Counsel, in the N.L.R.B. brief, seeks to avoid the deficiencies in the record by a circuitous argument which amounts, in its final analysis, to a statement that since the Collective Bargain Agreement was illegal *per se,* there was discrimination, and since there was discrimination, the Collective Bargaining Agreement was illegal *per se,* or by substituting what is claimed to be common knowledge, for evidence that does not appear in the record.

The trial examiner, in his concluding findings, correctly states (R. 24) that to find the contract illegal *per se,* it is necessary to approach the problem solely from the relevant language of the Agreement, without regard to contentions advanced by the General Counsel that the A.G.C. Chapters actually discriminated in the hiring of Lewis. The trial examiner then concludes that the Agreement is not illegal *per se* and capably distinguishes cases relied on by General Counsel, namely, *Pacific Intermountain Express Companies,* 107 NLRB 838, as modified, 225 F.(2d) 343. Careful analysis by trial examiner appears in the record (R. 24-30). Particularly relevant is his comment (R. 30) as follows:

> " * * * But it seems to me that hiring hall provivisions which are not stated in discriminatory terms, do not become discriminatory simply be-

> cause of the omission of an express prohibition against discrimination. * * * ''

The trial examiner then proceeds to examine the evidence of actual discrimination in the hiring of Lewis and makes a finding that there was no such discrimination by the A.G.C. Chapters. This finding is set out in paragraph (3) of the Specifications of Error at page 4 of this brief.

Notwithstanding this lack of evidence, the N.L.R.B., in its order and decision (R. 44 at 45 and 46), concludes without making any specific finding that discrimination in fact occurred. General Counsel, in his brief, attempted to support this position.

A substantial error occurs in the Statement of Facts at page 5 of the N.L.R.B. brief. The erroneous statement is that:

> ''The employer members of each of the respondent Chapters had frequent occasion to use the services of Local 242 hiring hall.''

The record does not support this conclusion, and in fact contradicts the findings of the trial examiner, above mentioned, and is contrary to the uncontradicted testimony of Will Landaas (R. 99, 100) that the Mountain Pacific Chapter does not use Local 242, particularly hod carriers. In fact, there was no proof, as trial examiner found, that any A.G.C. Chapter, or any of its members, requisitioned any labor from Local 242 during the period in controversy (R. 33).

At page 17 of the N.L.R.B. brief, General Counsel states:

> '' * * * The prerequisites to a finding that these Sections have been violated, thus, are a showing

> (1) of discrimination respecting employment for which the employer and union are responsible; and (2) that such discrimination encourages or discourages union membership. * * * ''

General Counsel then quotes cases of actual employer discrimination with facts sufficient in themselves to charge the employer with unfair labor practices. These cases all involve contracts where union employees were given preference in hiring. From these cases, the General Counsel concludes that where you have contracts governing the terms of hire, discriminatory treatment is not essential and that Section 8(a)(3) of the Act was violated. At page 19, in the brief, General Counsel states:

> '' * * * In short, where the contract in question governs the terms upon which hiring hall shall be conducted, evidence of specific discriminatory treatment is not essential to a finding that Sections 8(a)(3) and (b)(2) have been violated. The unfair labor practice is established if it can be shown that the hiring features of the contract 'tend * * * to encourage membership in a labor organization' * * *.''

General Counsel thus fails to sustain his alleged prerequisites by competent evidence.

General Counsel overlooks the fact that this proceeding is not only to stop an alleged discriminatory practice, but to secure back pay awards for Lewis from persons in no way responsible for the acts of Local 242 in the treatment of Lewis.

Beginning at page 19 of the N.L.R.B. brief, General Counsel argues that the hiring clause in controversy en-

courages union membership and attempts to support this assertion by the next assertion which, in substance, is that everybody knows that where hiring is delegated to a union, discrimination and encouragement of union membership will result. There is nothing, however, in the record to support this argument.

Again, beginning at page 25 of the N.L.R.B. brief, the General Counsel argues, in absence of proof, that we can assume that the hiring hall of Local 242 was so well known to building trade employees that they knew it would be useless to make direct job applications. Cyrus Lewis knew of the hiring hall. He went to the same voluntarily. He also apparently knew of his rights under the National Labor Relations Act of 1947; otherwise, he would not have so quickly found his way to the Board office to file charges. It is fair to assume that Lewis was more interested in back pay awards than work; that he knew employers could hire directly and if he had applied, might have secured work. The foregoing are assumptions, but there is as much right to assume things favorable to the employers in this suit as to assume things in favor of General Counsel's position in his brief.

Both the N.L.R.B. and the General Counsel seek to avoid rudimentary rules of law and evidence and to fill the void of lack of evidence with surmise and conjecture. The Board's position is summarized at page 37 of its brief:

> " * * * As the Board pointed out, 'Had (Lewis) gone directly to one of the Respondent Employers, he would unquestionably have been rejected summarily and referred to the union hall for clear-

> ance.' (F.R. 207). In short, the parties to the contract had made Local 242 their hiring agent with respect to all jobs covered by the contract, and under conventional agency principles, they may be held responsible for the Local's conduct. *N.L.R.B. v. Shuck,* 243 F.(2d) 519, 521-523 (C.A. 9); *N.L.R.B. v. Waterfront Employers,* 211 F.(2d) 946, 953-954 (C.A. 9). Indeed, the result would not be different even if, contrary to what we have shown, the hiring contract were valid. The agreement placed no restrictions upon Local 242's selection of applications for referral, and its discrimination in the performance of its task plainly was within the general scope of its authority so as to bind the principals on whose behalf it acted. * * * "

This statement continues the error repeatedly made by the Board and counsel to the effect that Mountain Pacific made Local 242 its agent with respect to all job referrals, in spite of the record to the contrary, namely:

(a) That Mountain Pacific acts for its members in negotiating agreements, it does not do any hiring. Each member does its own hiring, so as to the actual hiring practices, Mountain Pacific is not an agent of the employer (R. 100).

(b) That Mountain Pacific and its members do not requisition workmen from Local 242, so Local 242 could never be its agent (R. 99, 100).

(c) There is no evidence that Mountain Pacific members ever call for hod carriers much less that they use plaster in building highways, roads and dams requiring the use of hod carriers.

Again we wish to emphasize that the Chapters are

separate corporations and do not act as one body, or as agents for each other (R. 82).

The assumed futility of Lewis seeking direct employment is refuted by the record. Members of the A.G.C. Chapters do hire directly (R. 107 and R. 82-83).

Under the common law and the Constitution of the United States, persons, corporations or organizations cannot be charged with liability for a loss sustained by a person such as Cyrus Lewis unless the loss occasioned was proximately caused by the person to be charged or by an agent of that person. To hold otherwise would violate all concepts of law and the due process clause of the Federal Constitution.

CONCLUSION

It is, therefore, respectfully submitted that the trial examiner's decision as to the A.G.C. Chapters, particularly as to the Mountain Pacific Chapter, was correct, and that no Decree should issue enforcing the Board's Order as to the Mountain Pacific Chapter, and particularly that in no event should a back pay award be made against said Chapter.

Respectfully submitted,

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